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IN THE

# Supreme Court of the United States

BELL ATLANTIC CORPORATION, ET AL.,

*Petitioners*,

v.

WILLIAM TWOMBLY, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF *AMICI CURIAE* LEGAL SCHOLARS IN SUPPORT OF PETITIONERS

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## BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

## INTEREST OF THE *AMICI CURIAE*[1]

*Amici curiae* Legal Scholars take seriously their responsibility to assist in the orderly and rational development of the law through their scholarship as well as through participation in the litigation process on matters of great import. We are admonished that lawyers should contribute in the "important * * * public service role * * * of the lawyer as law reformer." Stephen Breyer, *Our Civic Commitment*, Remarks at the Annual Meeting of the American Bar Association (2001). *Amici* thus submit this brief to assist the Court in this case of tremendous practical and legal significance.

*Amici* are law professors and legal scholars who teach and write in the areas of antitrust and civil procedure. *Amici* include Richard A. Epstein, James Parker Hall Distinguished Service Professor of Law, University of Chicago Law School; Max Huffman, Visiting Assistant Professor of Law, University of Cincinnati College of Law; Christo Lassiter, Professor of Law, University of Cincinnati College of Law; and Paul Stancil, Visiting Assistant Professor of Law, University of Illinois College of Law at Urbana-Champaign.

*Amici* are concerned that the panel opinion below relies on a reading of this Court's precedents, including *Conley* v. *Gibson*, 355 U.S. 41 (1957), and *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002), that is not supportable on a careful reading

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[1] Under Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. Funds provided by the University of Cincinnati College of Law paid the cost of printing this brief.

of those cases. Indeed, the panel's rule—that allegations are sufficient to meet the standard of Federal Rule of Civil Procedure 8(a)(2) so long as they do not affirmatively exclude the possibility of a plaintiff's having a claim—is a *reductio ad absurdum* of the language this Court employed in *Conley*, and fails to heed the text of the rule. This Court has admonished that the rules of procedure mean what they say. See *Leatherman* v. *Tarrant Cty. Narcotics Intelligence & Coord. Unit*, 507 U.S. 163, 167-168 (1993). The standard followed by the panel violates that admonition by writing out of the rules the power of a district court to dismiss a plaintiff's suit for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

The panel's new standard also undermines decades of development of antitrust and economic thought, reflected in this Court's decisions including *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), *Monsanto Co.* v. *Spray-Rite Services Corp.*, 465 U.S. 752 (1984), and *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954). Courts and scholars long have recognized that parallel conduct by competitors does not raise red flags about the possibility of illegal concerted action. The oft-recognized and well-understood danger of "false positives" imposing dead-weight costs on the economy as a whole—see, *e.g.*, Richard A. Epstein, *Motions to Dismiss in Antitrust Cases: Separating Fact from Fantasy*, AEI-Brookings Related Pub. No. 06-08, at 3-4 (2006)—militates in favor of standards that do not penalize legitimate business conduct. Allegations of parallel conduct, while not necessarily inconsistent with illegal concerted activity, do nothing to "tend to exclude the possibility" (*Monsanto*, 465 U.S. at 764)—indeed, the *probability* (Epstein, Related Pub. 06-08, *supra*, at 4)—of unilateral business conduct.

*Amici* believe the Court should reverse the decision of the Second Circuit below and state a rule that (1) gives effect to the plain language and clear import of the Federal Rules of Civil

Procedure, and (2) respects well-established antitrust doctrine based on decades of economic understanding about competitors' conduct.

## STATEMENT

It is appropriate that this case arises at the interplay between the rules for pleading and dismissing cases under the Federal Rules of Civil Procedure, Rules 8(a)(2) and 12(b)(6), and the doctrine relating to conspiracies to restrain trade in violation of Sherman Act § 1, 15 U.S.C. § 1. The modern conceptions of the two legal schemes are both creatures of the last half-century. See *Conley* v. *Gibson*, 355 U.S. 41 (1957) (pleading standards under Rule 8); *Theatre Enters., Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954) (standards for circumstantial evidence of a conspiracy). Both schemes provide mechanisms to compensate for injury and deter injurious conduct. Both present dangers of abuse that can summon drastic social ills.

But properly understood, the modern rules governing the pleading standard under the federal rules and the understanding of conspiracy under § 1 dovetail neatly. Together they prescribe the means by which potentially meritorious antitrust litigation can proceed to discovery and trial, and litigation that is not based on any reasonable belief of wrongful conduct can be stopped before excessive waste occurs.

### A. The Litigation

The interplay between Rule 8 and the requirements for proving a conspiracy under § 1 came before the courts below in the context of a suit alleging a conspiracy among providers of local telephone and Internet services. Respondents claimed petitioners conspired to do two things: (1) to prevent entry by competitors into their respective markets, and (2) not to enter each others' markets in competition with one another. JA 27. The result, respondents alleged, was that petitioners maintained monopolies in their geographic markets and consumers were injured. See JA 31.

The industry at issue in this case is one marked by a complex history of regulated monopoly and, over the past decade, torturous deregulation. Petitioners' respective service markets exist largely because until February 8, 1996—the date of President Clinton's signing the Telecommunications Act of 1996 into law—their monopolies in those markets were protected by state law. Pet. App. 37a. One result of deregulation has been to create two types of business model for firms seeking to provide local telecom services. One model is essentially the traditional local telephone provider, which are incumbent firms (called ILECs) serving the regions in which, before deregulation, they often had exclusive franchises under state law. Pet. App. 37a. The other model is a class of competitors (called CLECs) who seek to serve customers now that markets have been opened to competition. Pet. App. 37a-38a.

Respondents brought this action originally as a Sherman Act § 2 (15 U.S.C. § 2) claim against one of the petitioners, alleging unilateral exclusionary conduct of the nature alleged by the plaintiff in *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). See Pet. 4. The claims became claims of conspiracy to exclude competitors and conspiracy not to compete after this Court held in *Trinko*, 540 U.S. at 408, a § 2 claim was not cognizable in the context of the Telecommunications Act of 1996. See Pet. 4-5.

**B. The Opinions Below**

In a careful and scholarly opinion on petitioners' motion to dismiss under Rule 12(b)(6), Judge Gerard Lynch of the Southern District of New York dismissed respondents' complaint. The court viewed the Rule 8(a)(2) pleading standard through the lens of § 1. Pet. App. 40a. Because "the Supreme Court 'has never held that proof of parallel business behavior * * * itself constitutes a Sherman Act offense,'" Judge Lynch noted the court's responsibility to "distinguish between conduct that represents the natural convergence of competitors' market behavior, and conduct that appears to have been taken pursuant

to an agreement." Pet. App. 41a (quoting *Theatre Enters.*, 346 U.S. at 541). Judge Lynch turned to the "plus factor" framework that courts of appeals broadly hold defines the distinction this Court has drawn[2] between innocent parallel conduct and circumstantial evidence of collusion. Pet. App. 42a. To Judge Lynch, the plus factors were shorthand for respondents' responsibility to "assert facts that, if true, support the existence of a conspiracy." Pet. App. 42a.

Judge Lynch noted respondents' specific allegations did nothing to advance the complaint beyond merely alleging parallel conduct. Everything respondents alleged was explainable as legitimate exercises of independent business judgment by petitioners. The Gerrymandered appearance of petitioners' territorial markets—which "might be enough in itself to support an inference of conspiracy, *in most industries*"—in the telecom industry is the result of historical accident. Pet. App. 47a (emphasis added). The parallel conduct in being inhospitable to entry by CLECs into their respective markets "would be in each ILEC's individual economic interest." Pet. App. 48a. The parallel conduct in collectively not entering each others' markets as CLECs readily was explainable by the fundamentally different nature of the CLEC business model ("essentially middlemen, buying network time from ILECs * * * and selling it for a profit") from the ILEC business model. Pet. App. 51a-54a. And respondents themselves alleged that "becoming a CLEC is an extraordinarily difficult enterprise." Pet. App. 54a, 55a.

Finally, the court disposed of two allegations: one a quote by a CEO of one of the petitioners which, taken in the entire context of his statement, spoke to unilateral best interest and not to a conspiracy (Pet. App. 56a), and the other a blanket allegation made on information and belief that petitioners had

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[2] See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

conspired, which courts uniformly reject as insufficient to meet a plaintiff's pleading burden (Pet. App. 42a).

In an opinion by Judge Sack, a panel of the Second Circuit believed factual allegations that were ambiguous as to whether conduct was legitimate or illegal were sufficient to survive a motion to dismiss. Pet. App. 25a. "[A] court would have to conclude that there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." Pet. App. 25a (emphasis added). Acknowledging that to survive summary judgment, a § 1 plaintiff must provide evidence "'that tends to exclude the possibility'[3] that the alleged conspirators acted independently," the court held this standard was unique to the summary judgment stage. Pet. App. 24a.

## SUMMARY OF ARGUMENT

The interplay of Rule 8 and the substantive standards for a violation of § 1 mandate reversal of the panel opinion.

I. Rule 8 codifies a standard of pleading under which complaints that provide proper notice and show the pleaders' entitlement to relief are sufficient to permit the litigation to proceed to discovery. But Rule 8 is not an open door. The minimal standards for pleading codified by the rule and recognized by this Court in *Conley* v. *Gibson*, 355 U.S. 41 (1957), and other cases, operate to ensure (1) notice to a defendant, and (2) a court's ability to dismiss cases in which the allegations do not show a right to a remedy. That understanding of the pleading standards comports with the plain language of Rule 8(a)(2) and Rule 12(b)(6). Although the broad language this Court employed in *Conley* has been cited in favor of open-ended pleading, this Court since has made clear the pleading standards have teeth. Likewise, Rule 8(f) prescribes that pleadings "*shall* be so construed as to do substantial justice." (Emphasis added.)

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[3] *Matsushita*, 475 U.S. at 588.

II. Applying the pleading requirements in the context of a § 1 claim, a plaintiff's factual allegations must give rise to an inference of a conspiracy. No dispute exists in this case that conscious parallel conduct by competitors does not constitute an agreement. To show entitlement to relief, a plaintiff must plead facts that "tend to exclude the possibility" that the defendant acted in its unilateral best interest. This pleading burden is an application of the "plus factors" framework, but the plus factor framework, which includes facts that do not necessarily relieve ambiguity about the conduct alleged, is not necessarily sufficient. The appropriate standard is the one this Court recognized in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Monsanto Co.* v. *Spray-Rite Services Corp.*, 465 U.S. 752 (1984). A plaintiff must plead facts that tend to exclude the possibility of innocent conduct.

## ARGUMENT

The Court should reverse the decision below. This case presents an opportunity to announce a rule that reconciles a seeming—but illusory—tension between the liberal standard for pleadings the Court unanimously announced in *Conley* v. *Gibson*, 355 U.S. 41 (1957), and the Court's recent, also unanimous, recognition that the requirement that a plaintiff prove an ultimate fact implies a requirement that the plaintiff allege that fact. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 346 (2005) (supporting the holding by citing to *Conley*, 355 U.S. at 47); see also *Associated General Contractors of Cal.* v. *California State Council of Carpenters*, 459 U.S. 519, 526 (1983) ("It is not * * * proper to assume the [plaintiff] can prove facts that it has not alleged * * *.").

The Court's holding also should reaffirm the wisdom underlying its decisions in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993),*Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), *Monsanto Co.* v. *Spray-Rite Services Corp.*, 465 U.S. 752 (1984), and *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), that conscious parallel

conduct by competing firms is not illegal. The pleading standard under Rule 8(a)(2) requires allegations of facts supporting an inference of conduct that provides a basis for a remedy.

## I. Rules 8(a)(2) and 12(b)(6) Ensure that Defendants Have "Fair Notice" and that Courts Can Dismiss Complaints That Do Not Show Entitlement to Relief

The Federal Rules of Civil Procedure state standards for the sufficiency of respondents' statement of claims. Fed. R. Civ. P. 8(a)(2). They provide a mechanism for courts to dismiss claims that are insufficient. Fed. R. Civ. P. 12(b)(6). They require courts to construe pleadings in a manner "as to do substantial justice." Fed. R. Civ. P. 8(f). The rules are not mere toothless tigers. They exist to ensure that a defendant is not subjected to the Kafka-esque difficulties of defending against suit without knowing what it did that gave rise to a plaintiff's claims. See *Conley*, 355 U.S. at 46 (defendant entitled to "fair notice of what the plaintiff's claim is and the grounds upon which it rests"). The rules also exist to provide district courts means to dismiss suits that are not justified by reference to governing legal standards. See *Dura*, 544 U.S. at 346 (allegation of harm must comport with the sort of harm recognized by the governing legal scheme). See also Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules*, 86 Colum. L. Rev. 433, 436 (1986) (arguing the purpose of pleading should be better to enable courts to decide cases on the merits).

### A. The Second Circuit's Open-Ended Pleading Standard Ignores the Plain Language of the Relevant Federal Rules

This Court unanimously held in *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), that Rule 8 "mean[s] what it sa[ys]." *Id.* at 168. The rules are not subject to amendment by judicial interpretation. *Ibid.* "We give the Federal Rules of Civil

Procedure their plain meaning, and generally with them as with a statute, '[w]hen we find the terms * * * unambiguous, judicial inquiry is complete * * *.'" *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 123 (1989) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)) (other citations omitted). The Court need look no further than the rules that govern respondents' complaint and petitioners' motion to dismiss to reverse the court below.

1. "[I]n order to satisfy the requirements of Rule 8(a) the pleading must contain something more by way of a claim for relief than a bare averment that the pleader wants compensation and is entitled to it * * *." 5 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1216, at 235-236 (3d ed. 2004). Rule 8(a)(2) requires "a short and plain statement of the claim *showing that the pleader is entitled to relief*." (Emphasis added.) In *Dura*, this Court unanimously held a failure to allege the plaintiff's loss was proximately caused by the defendant's illegal conduct warranted dismissal of the complaint. 544 U.S. at 346-347 (interpreting the basic Rule 8(a)(2) pleading standard). *Dura* commands the conclusion that a plaintiff must allege facts making out each element of its claim. "Our holding about plaintiffs' need to *prove* proximate causation and economic loss leads us also to conclude that the plaintiffs' complaint here failed adequately to *allege* these requirements." *Id.* at 346. This unanimous holding was rendered with full cognizance of the liberal pleading standards discussed in *Conley* and *Swierkiewicz*. *Dura*, 544 U.S. at 346-347 (citing *Conley*, 355 U.S. at 47, and *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 513-515 (2002)). See also *Associated General Contractors*, 459 U.S. at 526 (a plaintiff should not be permitted to prove facts not alleged).

The court of appeals gave *Dura* only passing mention. Pet. App. 13a. It relied instead on this Court's decision in *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002), for the propositions that antitrust actions are not "instances requiring * * * particularized pleadings" (Pet. App. 13a) and that "'Rule

8 pleading is extremely permissive.'" Pet. App. 14a (quoting *Wynder* v. *McMahon*, 360 F.3d 73, 77 (2d Cir. 2004)). Seizing on those non-controversial propositions, the court ignored the analysis by Judge Lynch of why *Swierkiewicz* does not control this case. Pet. App. 43a-45a. Simply, *Swierkiewicz* held a plaintiff is not required to plead the entirety of a burden-shifting analysis when making a claim of discrimination on the basis of national origin in violation of Title VII and the ADEA. 534 U.S. at 510-512. This is because the burden-shifting analysis "is an evidentiary standard, not a pleading requirement," (*id.* at 510), and it is possible to prove a violation of Title VII through direct evidence, bypassing the burden-shifting requirement. *Id.* at 511-512. But as Judge Lynch recognized, nothing about *Swierkiewicz* removes a plaintiff's responsibility to allege facts "showing" the plaintiff's entitlement to relief. Pet. App. 44a.

2. Some courts and commentators have been misled by language this Court employed in *Conley* to hold that so long as the plaintiff's complaint does not affirmatively demonstrate the plaintiff is *not* entitled to relief, a motion to dismiss must be denied. See, *e.g.*, Pet. App. 11a, 25a. Taking at face value the "no set of facts" standard, as the court of appeals apparently did, produces absurd results. "Literal compliance with *Conley* v. *Gibson* could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment." Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 Tex. L. Rev. 1665, 1685 (1998).

*Amici* believe *Conley* did not actually announce such a non-standard. "Implicit in [*Conley*] is the notion that the rules do contemplate a statement of the circumstances, occurrences, and events in support of the claim being presented." 5 Wright & Miller, Fed. Prac. & Proc., *supra*, § 1215, at 194. But examining briefly the contours of the panel's approach produces exactly the same absurd result that Professor Hazard observed could arise from an unschooled reading of *Conley*. The panel held that to dismiss the complaint, there could be "no set of facts that would permit a plaintiff to demonstrate that the

particular parallelism asserted was the product of collusion rather than coincidence." Pet. App. 25a; see also Pet. App. 19a ("[t]he factual predicate that is pleaded does need to include conspiracy among the realm of plausible possibilities"). So long as an illegal conspiracy is "among the realm of plausible possibilities" from the allegations, the panel would hold them sufficient. Pet. App. 19a. That understanding of Rule 8(a)(2) is tantamount to saying a plaintiff can plead perfectly innocent conduct, and be entitled to discovery to determine whether there might be illegal conduct on which to state a claim.

That approach, if it is correct, would write the Rule 12(b)(6) procedure out of the federal rules. Rule 12 recognizes district courts have power to dismiss cases before an answer is filed. Dismissal explicitly is appropriate if the complaint "fail[s] to state a claim on which relief can be granted." Rule 12(b)(6). If a complaint were sufficient any time it did not affirmatively demonstrate its own insufficiency, as the panel below held, district courts would in almost every case lack the power to dismiss for failure to state a claim explicitly granted by Rule 12. The Court ought not accept an interpretation of Rule 8 that is inconsistent with the plain language of Rule 12.[4]

The Second Circuit's approach also cannot be reconciled with this Court's unanimous opinion in *Dura*. The complaint in that case was insufficient because it did not allege loss causation. But had the panel below analyzed that complaint, it would have been upheld. It would have been theoretically possible for the plaintiffs in *Dura*, like respondents in this case, to prove facts they did not allege (proximate cause there; an

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[4] See, *e.g.*, *Wilson* v. *Rousseau*, 45 U.S. 646, 690 (1846) (McLean, J., dissenting) ("[t]he most natural and genuine way of construing a statute is to construe one part by another part of the same statute"); *id.* at 691 ("This view gives effect to the section, and harmonizes its provisions. The other construction makes the parts of the section repugnant, and nullifies the whole of it. Now, which is the more reasonable view?").

agreement here) that were not inconsistent with the insufficient facts they *did* allege.

3. Commentary by Judge Charles E. Clark and his contemporaries supports interpreting Rule 8 in accordance with its plain language. The thrust of Rule 8, in Judge Clark's view, was the avoidance of detail in pleadings—not the elimination of a requirement that the plaintiff "state a claim." Charles E. Clark, *Special Pleading in the "Big Case"*, 21 F.R.D. 45, 52 (1957).

According to "Judge Arthur T. Vanderbilt, Chief Justice of the New Jersey Supreme Court, ex-president of the American Bar Association, well known advocate of the new Federal Rules and of sensible pleading, writer of the forward to Barron and Holtzoff's Federal practice":

> "The flexibility and seeming informality of pleadings under the new rules should not deceive one into believing that the essentials of sound pleading at law or in equity have been abandoned. Quite the contrary; the objective of reaching an issue of law or of fact in two or at the most three simple pleadings has been attained but *not at the sacrifice of stating the elements of a claim or defense* * * *. The grand objective of the movement for simplified procedure by rules of court is the elimination of the interminable prolixity and absurd technicalities of special pleading—not by abandoning stating the essentials of a cause of action or of a defense, but by doing so in 'simple, concise and direct' terms."

Statement of Judge Hall, in *Claim or Cause of Action*, 13 F.R.D. 253, 264-265 (1952) (quoting a letter from Judge Vanderbilt) (emphasis added).

"A claim for which relief can be granted is a claim which is cognizable in law. Anything less is not cognizable in law * * *." Statement of Judge Mathes, *id.* at 265. Another commentator decried interpretations of Rule 8(a)(2) that emphasized liberal pleading at the expense of the plain language

of the rule. "Those words 'showing that the pleader is entitled to relief' seem to have been read out of the Rule * * *." Statement of Moses Laskey, *id.* at 268-269.

### B. The Court Should Clarify That Rule 8(a)(2), Combined With the Rule 8(f) Instruction To Construe Pleadings To Do "Substantial Justice," Permits Courts Leeway When Considering Complaints in Extreme Cases

Reversal also is warranted because the complaint does not provide petitioners notice of what about their conduct respondents are complaining. This Court repeatedly has stated the importance of testing complaints carefully. Rule 8(f) specifically *requires* construction of complaints so as to do "substantial justice." A pleading standard that sends parties to multi-million dollar discovery despite a plaintiff's failure to allege facts meeting the elements of a cause of action plainly violates that requirement.

1. Even the most ardent advocates of liberal pleading practice emphasize the necessity that the complaint put a defendant on notice of the claims against it. See, *e.g.*, Charles E. Clark, *Pleading Under the Federal Rules*, 12 Wyo. L.J. 177, 181 (1958).[5] This Court repeatedly has emphasized that requirement. See, *e.g.*, *Dura*, 544 U.S. at 346. The requirement that a defendant have sufficient information to prepare its defense is what precludes a plaintiff's resorting to alleging legal conclusions, rather than facts supporting their claims. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz. L. Rev. 987, 999 (2003) ("Broad statements of legal conclusion

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[5] Although Judge Clark was the architect of the Federal Rules and regularly is cited as the principal proponent of the notice pleading standard, he and other commentators on Rule 8 have denounced a standard that depends on nothing more than "notice." See Clark, 12 Wyo. L.J., *supra*, at 181 (Rule 8 does not prescribe mere notice pleading); 5 Wright & Miller, Fed. Prac. & Proc., *supra*, § 1202, at 92 (notice pleading is an "unfortunate" label).

do not meet the pleading requirements under the Federal Rules * * *. The reason is simple. Legal conclusions do not comport with a notice standard."). Cf. Clark, 21 F.R.D., *supra*, at 52 (noting the "settled view that the pleader shows the facts and the court applies the legal conclusion").

The complaint in this case offers nothing more than bare allegations—contained in two separate paragraphs—that "upon information and belief," "Defendants entered into a contract, combination or conspiracy to prevent competitive entry in their respective * * * markets." JA 11, 27. Courts uniformly hold that such a bare bones allegation is insufficient to survive a motion to dismiss. See, *e.g.*, *Tal* v. *Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006); *DM Research, Inc.* v. *College of American Pathologists*, 170 F.3d 53, 56 (1999) (Boudin, J.); *Sutliff, Inc.* v. *Donavan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) (Posner, J.); *Heart Disease Research Found* v. *General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972). See also Fairman, 45 Ariz. L. Rev., *supra*, at 1036 (noting a judicial "consensus" under which "[c]onclusory allegations [of conspiracy] are consistently rejected"); Richard L. Marcus, 86 Colum L. Rev., *supra*, at 435 (noting "a number of areas in which courts refuse to accept 'conclusory' allegations as sufficient under the Federal Rules").[6] Without more, that allegation is nothing more than an allegation that "the defendant torted me"—it tells petitioners nothing about what conduct they supposedly undertook that makes out the alleged conspiracy. As Judge Lynch recognized, a conclusory conspiracy allegation does not give the necessary notice "of how and why the defendants are alleged to have conspired."

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[6] As the First Circuit noted in just this context in *DM Research, Inc.*, 170 F.3d at 55, "[c]onclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition." This litigation paints a particularly compelling picture why that concern exists. Respondents seek not just to engage in a fishing expedition, but to require petitioners to fund a deep-sea charter on a multi-million-dollar yacht.

Pet. App. 45a. Respondents apparently do not challenge that reality here. See Opp. 25.

The notice requirement also is a fundamental distinction between this Court's opinions in *Swierkiewicz* and *Conley* and this case. Judge Lynch recognized "the factual basis of a Title VII claim is fairly self-evident—respondent suffered an adverse job action and alleges that it was the result of discrimination." Pet. App. 45a. So, too, with the allegations required to state a claim for negligence resulting in a car crash injuring the plaintiff, detailed in Form 9 to the Federal Rules. And the case that might be thought the "poster child" for the modern pleading standard, *Dioguardi* v. *Durning*, 139 F.2d 774 (2d Cir. 1944) (Clark, J.), approved coarsely-drawn allegations that the defendant improperly disposed of items belonging to the respondent, causing respondent harm. *Id.* at 774-775. Essential to all of these cases is that, however simple the allegations involved, a defendant can understand exactly of what the plaintiff is complaining. By contrast, the conclusory allegation that "defendants conspired" does not tell petitioners in what conduct they are supposed to have engaged.

2. The notice concerns underlying Rule 8(a)(2) take on special significance in the context of litigation, like this case, in which denying a motion to dismiss gives "an *in terrorem* increment of the settlement value." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975). In *Associated General Contractors*, like this case a complex private antitrust suit, the Court noted that "in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." 459 U.S. at 528 n.17.[7]

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[7] Implicit in these holdings is the understanding that modern complex litigation does not fit neatly into the paradigm of litigation envisioned by the drafters of the federal rules in 1938. See Richard A. Epstein, *Motions to Dismiss in Antitrust Cases: Separating Fact from Fantasy*, AEI-

This case raises the specter of just the *in terrorem* settlements for which this Court has expressed concern. As the Seventh Circuit noted when affirming a dismissal of a § 1 complaint, "the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Car Carriers, Inc.* v. *Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (Easterbrook, J.) (citing cases including *Associated General Contractors*, 459 U.S. at 528 n.17, and *Sutliff*, 727 F.2d at 654).

The expense and potential for abuse of discovery in massive litigation—including, but not limited to, antitrust litigation—has been much remarked by this Court, judges, and commentators. According to Judge Easterbrook, "[a]n impositional * * * discovery request is one 'justified' from the demander's perspective not by its contribution to an anticipated judgment but by its contribution to an anticipated settlement." Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 637 (1989). And "[i]mpositional discovery requests depend on asymmetric costs. If E's demands injure F more than F's demands can injure E, then E has every reason to pepper its adversary with requests." *Id.* at 643. See also William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887, 1902-1903 (2003) (noting the effect of asymmetry between the parties' litigation costs).

Outside of the Rule 12 procedures for disposing of claims early, the U.S. system lacks a means to control the problem of impositional discovery. "Because litigants do not bear the costs created by their discovery requests, their incentive to confine those requests in a procedurally efficient manner is significantly distorted." Martin H. Redish, *Electronic Discovery and the*

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Brookings Joint Center for Regulatory Studies Related Pub. 06-08, at 3 (March 2006).

*Litigation Matrix*, 51 Duke L.J. 561, 569 (2001). Judge Easterbrook further has argued that for a host of reasons, control of discovery by judges is a marginally effective protection against these abuses. Easterbrook, 69 B.U. L. Rev., *supra*, at 638-639.

The result is that "fee shifting, ever-spiraling discovery costs, and weak judicial safeguards against discovery abuse, result in a structure whereby an opportunistic plaintiff alleging a frivolous antitrust claim can extract a sizable settlement that exceeds the expected value of the plaintiff's award at verdict." Wagener, 78 N.Y.U. L. Rev., *supra*, at 1888. This is all the more so in the modern era of electronic, computer-based discovery, which "may involve extraordinary costs that are clearly outside the usual cost of doing business." Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, 2000 Fed. Cts. L. Rev. 2, 13, *available at* http://www.fclr.org/articles/2000fedctslrev2.pdf; see also Georgene Vairo, *Developments in the Law: Electronic Discovery*, 38 Loyola L.A. L. Rev. 1529, 1530 (2005) (noting that "the volume of electronically-stored material presents huge problems for large corporations").[8] "The same rules of discovery that generate one or two days worth of litigation in simple contract disputes" can take "years if not decades" in the case of massive class action

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[8] To be sure, the Federal Rules give courts power to "condition discovery in some cases upon the bearing of costs." Withers, 2000 Fed. Cts. L. Rev., *supra*, at 13. See, *e.g.*, *Anti-Monopoly, Inc.* v. *Hasbro, Inc.*, 1996 WL 22976, at *2 (S.D.N.Y. Jan. 23, 1996) (requiring the plaintiff to pay defendants' costs in creating a computer program to search defendants' electronic files). But apart from a judge's discretion, no special rules exist to protect defendants in the new context of electronic discovery. "Courts have held, as they do in traditional discovery, that inconvenience and expense are not valid reasons for the denial of electronic discovery." Redish, 51 Duke L.J., *supra*, at 575. A defendant's "blackmail settlement" (Henry Friendly, Federal Jurisdiction: A General View 120 (1973)) calculus often will be made before it is clear whether judicial intervention will protect them from unduly burdensome discovery costs.

against national companies like petitioners. Epstein, Related Pub. 06-08, *supra*, at 6. See also Paul J. Stancil, *Atomism and the Private Merger Challenge*, 78 Temple L. Rev. 949, 996-999 (2005) (describing the "staggering[]" expense of defending against private antitrust suits and the disparity in costs incurred by defendants *vis-à-vis* plaintiffs). In the almost unimaginably large class action before the Court—purporting to involve as plaintiffs hundreds of millions of consumers, against the companies that together provide the vast majority of local telephone and Internet services in the United States—all of those concerns are elevated to a fever pitch.

3. "A more responsible approach, which seeks *both* to give notice and weed out groundless claims, also requires the procedural system to make some critical assessment of the costs and benefits of stopping litigation at the pleading stage relative to those of going forward with discovery." Epstein, Related Pub. 06-08, *supra*, at 12. The federal rules explicitly provide a mechanism for considering the realities of massive, complex, and blackmail litigation in considering motions to dismiss complaints. Rule 8(f) instructs that "[a]ll pleadings *shall* be so construed as to do substantial justice." (Emphasis added.) Although this Court has applied Rule 8(f) in the context of resuscitating a complaint to protect a plaintiff's cause of action (see, *e.g.*, *Swierkiewicz*, 534 U.S. at 513-514), by its plain language the rule applies equally to permit dismissal of complaints that serve the ends of coerced settlement rather than merits determinations.

*Amici* do not argue that complex cases or antitrust cases should be subject to a "heightened" pleading standard. See Rule 9(b). This Court's opinion in *Leatherman* explicitly foreclosed any such approach. See 507 U.S. at 168. The rule from *Blue Chip Stamps*, *Associated General Contractors*, and *Dura*—which finds support in the text of Rule 8(f)—is that pleadings under Rule 8(a)(2) must be construed in light of the

realities of modern complex litigation.[9]

## II. For an Entitlement to Relief to Be Warranted by Sherman Act Section 1, the Facts Pleaded Must "Tend to Exclude the Possibility" of Independent Conduct

*Amici* argue above that the Rule 8(a)(2) standard requires allegations meeting the elements of whatever a plaintiff's substantive claim. That requirement permits courts to dismiss complaints based on legal theories that are deficient or incorrect—a process this Court expressly and repeatedly has approved. See, *e.g.*, *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128 (1998).

### A. Antitrust Law and Scholarship Long Have Comprehended that Parallel Conduct Does Not Support an Inference of Concerted Activity

1. There appears to be no dispute in this litigation that conscious parallel conduct by competitors does not suffice to state a claim under § 1. See *Theatre Enters.*, 346 U.S. at 541. "[C]onscious parallelism is never meaningful by itself * * *." It "is a neutral fact in the absence of evidence which would lead one to expect that [conduct] would have been different if truly independent decisions had been made." Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658, 659 (1962).

The rationale underlying *Theatre Enterprises* is simple and

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[9] Similarly, Federal Rule of Civil Procedure 1 states that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." In 1993 the rule was amended to add the phrase "and administered." The amendment recognizes "the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay." Fed. R. Civ. P. 1, Adv. Comm. Notes.

irrefutable. No matter what the level of competitiveness in an industry, firms acting in economically rational fashion can be expected to behave in a parallel manner. As *amici* economists argued in support of the petition for certiorari in this case, in a "perfectly competitive market, all firms charge the same price at all times." Economists' Br. 7; see *id.* at 8 (noting this phenomenon is not limited to prices, but includes "product design, entry, location, marketing, and other business decisions"). This phenomenon occurs because the firms are reacting in the same manner to the same impulses. *Id.* at 7.

But nor does parallel conduct necessarily imply the hypothetical "perfect competition." Parallel conduct will occur in an industry characterized by few competitors for the same or different reasons. Sufficiently substantial impulses—for example, significant regulatory developments or technological innovations—will cause all firms in an industry with few firms to react in identical fashion, just as if the industry was characterized by perfect competition. Firms may act in identical fashion because they look two moves ahead and are aware of the impact on the industry of their taking certain actions. See *Brooke Group*, 509 U.S. at 227 (it is not illegal for firms to "recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions"). Those same firms may also act in identical fashion because they imitate successful strategies their competitors employ. See Economists' Br. 8-9; see also *id.* nn. 4-5 (citing economic scholarly commentary).

This analysis serves to demonstrate what this Court repeatedly has recognized: that parallel behavior among firms in an industry tells us nothing about whether those firms are colluding. See *Theatre Enters.*, 346 U.S. at 541; *Brooke Group*, 509 U.S. at 227 (conscious parallel conduct is explainable by means other than a conspiracy); *Matsushita*, 475 U.S. at 589-593 (noting the inherent implausibility of the conspiracy the plaintiffs alleged); *Monsanto*, 465 U.S. at 762-764 (noting the existence of legitimate justifications for the complained-of

conduct). See also 2 Joseph P. Bauer & William H. Page, Kintner's Federal Antitrust Law § 11.5, at 62-63 (2d ed. 2002) (interpreting *Monsanto* and *Matsushita* to require facts inconsistent with unilateral conduct). In fact, commentators have noted that parallel conduct by competitors is most likely the result of legitimate, unilateral business decisions. See Epstein, Related Pub., *supra*, at 3; Economists Br. 9. Both courts below recognized this fact. Pet. App. 24a; Pet. App. 41a.

2. More, it is dangerous for courts to indulge the inference of a conspiracy in violation of the antitrust laws from facts that lead equally, or primarily, to a conclusion of legitimate unilateral behavior by competitors. Such an unfounded inference presents two extraordinary harms. First, a legal rule that permits the drawing of inferences of conspiracy from parallel behavior "would impose direct costs on business firms as management has to fight the major distractions of litigation, and it imposes dead-weight costs on the economy, by soaking up resources in rent-seeking litigation." Epstein, Related Pub. 06-08, *supra*, at 3. Second, the drawing of such unfounded inferences threatens firms with drastic consequences for engaging in economically rational, pro-competitive unilateral conduct. "[E]ntry, pricing, marketing and other business decisions would be colored by a dismissal rule that opens all American businesses to unsubstantiated allegations of conspiracy to restrain trade." *Ibid.* These concerns are relevant to a court's construction of a plaintiff's claims. See *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999) ("The acceptable inferences which we can draw from circumstantial evidence vary with the plausibility of the plaintiff's theory and *the danger associated with such inferences.*") (emphasis added). Cf. p. 18, *supra* (arguing for a construction of complaints informed by Rule 8(f)).

A rational reaction of firms to increased danger of litigation over legitimate unilateral conduct would be deliberately to undertake an *inefficient* course of conduct to avoid acting in parallel with competitors. For example, *amici* economists

observed how innovations are diffused through industries by imitative behavior by firms. Economists' Br. 8. Enter the threat of litigation because one firm has copied a successful strategy of its competitor—likely a unilateral business decision, but not *inconsistent* with acting in concert with the competitor. *Id.* at 9. The would-be imitator is now strongly encouraged, if not compelled, to delay or avoid implementing the particular innovation to avoid the threat of litigation. Given the massive expense of litigating a suit like the class action in this case, the expected return from the innovation itself would have to be massive for a competitor to risk implementing it.

The same limits on efficient behavior by businesses could give rise to higher prices and reduced output—the precise evils that at the most elemental level the antitrust laws exist to prevent. If one competitor lowers prices in an effort to increase market share, a price match by another will be parallel conduct that is not necessarily inconsistent with collusion. Cf. *Matsushita*, 475 U.S. at 594 (rejecting theory under which defendants were supposed to have conspired to maintain artificially low prices). A result might be that the first-mover gains a monopoly (and the corollary pricing power) while its competitor, stifled by a litigation threat, cannot react. The same occurs if, in response to an external stimulus, one competitor raises prices. Its competitor, fearful of reacting in kind, either monopolizes the market or fails because its prices are too low, in which case the first mover gains a monopoly.

These examples demonstrate the economic reality that restraints on rational business conduct harm consumers. According to Judge Bork, "adjustment to shifting costs and demand is socially desirable, and it is best that appropriate responses be made as quickly as possible." Robert H. Bork, The Antitrust Paradox 388 (1978). A rule that penalizes firms for undertaking the rational response to external stimuli—whether those stimuli are the actions of competitors or are external to the market—risks increasing price rigidity and stifling other business decisions. This Court more than once has "emphasized

that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." *Matsushita*, 475 U.S. at 593 (citing *Monsanto*, 465 U.S. at 762-764). Rules are discouraged that "'end up by discouraging legitimate price competition.'" *Id.* at 594 (quoting *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.)).

### B. To Support an Inference of a Conspiracy, Allegations of Fact Must "Tend to Exclude the Possibility" of Legitimate Unilateral Conduct

1. In *Monsanto*, the Court refused to permit "an agreement to be inferred from" conduct that occurs "in the normal course of business and do[es] not indicate illegal concerted action." 465 U.S. at 763 (internal quotations omitted). Instead, "there must be evidence that tends to exclude the possibility that the [defendants] were acting independently." *Id.* at 764. The Court reiterated in *Matsushita* that "a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." 475 U.S. at 588 (quoting *Monsanto*).

Contrary to the panel's understanding (Pet. App. 25a; see also Opp. 14), the rules from *Monsanto* and *Matsushita* are not somehow confined to the summary judgment procedure. *Amici* have argued proof should not be permitted as to elements of a claim that have not been pleaded. See pp. 9-10, *supra*. Thus, respondents' failure to plead an agreement under the *Monsanto/Matsushita* standard (a failure even the panel appeared to recognize, see Pet. App. 23a-25a) should preclude respondents from introducing evidence on that element. But without it, respondents cannot survive summary judgment. The panel's approach would require the parties to proceed to discovery toward an end at summary judgment that has already been decided.[10]

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[10] For this reason, as well as the extraordinary cost of discovery in a

Allegations of facts that are ambiguous as to whether conduct is innocent or not do not meet the standard. "In some cases the parallel conduct is at least equally consistent with an independent motive that each firm would pursue regardless of what the other firms did. In such cases * * *, there is not agreement or concerted action * * *." Einer Elhauge & Damien Geradin, Global Antitrust Law & Econ. ch. 6, at 22 (forthcoming Foundation Press). "[P]roof of an agreement requires some evidence that is *exclusively* of agreement." 2 Bauer & Page, Kintner's Federal Antitrust Law, *supra*, § 11.4, at 59.[11]

Allegations of interdependent conduct that does not involve agreement likewise do not meet the *Monsanto/Matsushita* standard. It is permissible for competitors in markets characterized by few competitors to make decisions "that take

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case of this magnitude (see pp. 15-17, *supra*), a suggestion that it might be appropriate to test respondents' allegations at the summary judgment stage is shortsighted. See Epstein, Related Pub. 06-08, *supra*, at 12-13 (noting regarding the *Twombly* litigation that "*all* of the plaintiff class's factual allegations are true (if vacuous). It therefore seems quite possible that the situation after exhaustive discovery will remain exactly where it is today. After all, if these statements are sufficient to support the inference of conspiracy, what kind of denials are so strong to lead to the conclusion that the case presents no genuine issue of fact[?]"). See also Cert.-stage Brief of MasterCard International Inc. and Visa U.S.A. Inc. As *Amici Curiae* in Support of Petitioners 6 n.6 (filed Apr. 6, 2006) (arguing that summary judgment is not an effective filter).

[11] Professors Bauer and Page demonstrate this concept graphically with a Venn diagram comprised of overlapping circles. If the leftmost circle represents evidence that indicates agreement, and the rightmost circle represents evidence that indicates independent action, the overlap represents evidence that is ambiguous as to whether it indicates agreement or independent action. "[E]vidence solely in [the overlap] is insufficient." 2 Bauer & Page, Kintner's Federal Antitrust Law, *supra*, § 11.5, at 59-60.

into account price interdependence * * *. [S]uch oligopolistic coordination does not involve an agreement or concerted action." Elhauge & Geradin, Global Antitrust, *supra*, ch. 6, at 22.

Lower courts have stated the required showing for circumstantial evidence of conspiracy to be one of "parallel conduct plus"—with the "plus" representing allegations that make it unlikely the parallel conduct is based on a firm's pursuit of its unilateral best interest. See, *e.g.*, *Mitchael* v. *Intracorp, Inc.*, 179 F.3d 847, 858-859 (10th Cir. 1999). "A plus factor is any form of evidence that tends to exclude the possibility that individuals work independently." Epstein, Related Pub. 06-08, at 10-11 (citing *Apex Oil Co.* v. *DiMauro*, 822 F.2d 246 (2d Cir. 1987)).

*Amici* recommend this Court not simply adopt the doctrine of "plus factors" from the courts of appeals. Plus factors are a vague amalgam of matters, all of which are relevant in the Evidence Rule 401 sense to the question of conspiracy, but which often fail to rise to the level of "tending to exclude the possibility" of unilateral conduct. Indeed, as respondents argue in this case (Opp. 25-26), they did state allegations of facts that courts have considered to be "plus factors." See JA 23 (trade association involvement); JA 26 (market structure is conducive to agreement). Cf. *Apex Oil Co.*, 822 F.2d at 253-254 (discussing plus factors including "a common motive to conspire or a high level of interfirm communications"). But the court noted in *Apex Oil Co.*:

> However, such plus factors may not necessarily lead to an inference of conspiracy. For example, such factors in a particular case could lead to an equally plausible inference of mere interdependent behavior, *i.e.*, actions taken by market actors who are aware of and anticipate similar actions taken by competitors, but which fall short of a tacit agreement * * *. In such a case, a court might find it difficult to hold that the parallel acts "tend to exclude the possibility" of independent action.

822 F.2d at 254 (citing Phillip E. Areeda, Antitrust Analysis 374-375 (3d ed. 1981)). See 2 Bauer & Page, Kintner's Federal Antitrust Law, *supra*, § 11.6, at 72 ("The mere opportunity to conspire, however, does not prove that a conspiracy took place.").

2. Effectively to plead a circumstantial case of conspiracy in violation of § 1, a plaintiff must plead facts that, if true, give rise to a reasonable inference that the parallel conduct was the product of a conspiracy. This rule is an application of the plus-factors framework that solves the question how to deal with allegations of ambiguous facts. Modern analysis of plus factors appears to be centering on this rule. See, *e.g.*, *In re Flat Glass Antitrust Litig*, 385 F.3d 350, 360-361 (3d Cir. 2004). Cf. 2 Bauer & Page, Kintner's Federal Antitrust Law, *supra*, § 11.5, at 64 ("[t]he decision to classify ambiguous evidence as a plus factor or merely as consistent with both collusion and independent action is often critical").

Sufficient allegations "could, for example, be in ordinary price fixing cases evidence that representatives of the defendants all converged on some out-of-the-way location for a secret meeting." Epstein, Related Pub. 06-08, *supra*, at 11. Allegations of conduct that would be truly irrational in the absence of concerted action also tend to exclude the possibility of unilateral conduct (but the allegations in this case, refuted as they are by known facts about the industry, do not meet the standard). Economic analysis, while it is not necessary to create a reasonable inference sufficient to survive a motion to dismiss, can be relevant at the motion to dismiss stage when economic principles are imbedded in the particular substantive rule of law. Cf. 2 Bauer & Page, Kintner's Federal Antitrust Law, *supra*, § 11.6, at 71 (plaintiffs might use "statistical techniques, like multiple regression analysis * * *, to isolate possible explanations for parallel conduct" so long as it "account[s] for all significant variables"). Whatever allegations a § 1 plaintiff makes, the facts alleged *must* give rise to a reasonable inference of unlawful conduct. Otherwise, legitimate, highly desirable

business decisions by competitors will be bases for requiring them to submit to massive fact-finding expeditions that often will coerce settlement, even if there is no risk they will give rise to liability.

The complaint in this case contains assorted allegations of plus factors that do not rise to the level of tending to exclude the possibility of unilateral business decisions. Allegations of opportunities to communicate with one another (JA 23) might support an inference that it is possible for petitioners to collude, but it is equally a feature of petitioners' industry in which all participants are required to interconnect with one another.[12] Allegations of an oligopolistic market structure and contiguous territories (JA 21, 26), while they might make collusion possible, do nothing to make unilateral conduct improbable. Neither allegation tends to exclude the possibility of legitimate unilateral conduct. Both merely go to "opportunity to conspire." See 2 Bauer & Page, Kintner's Federal Antitrust Law, *supra*, § 11.6, at 72. The district court correctly concluded that those allegations are not sufficient to defeat the motion to dismiss.

Allegations that petitioners have unilateral incentives to enter one another's markets (JA 21), once again, might lend themselves to collusive conduct. Unlike the allegations discussed in the prior paragraph, this allegation might be sufficient in other circumstances to permit an inference of a conspiracy. Any such inference is defeated in this case, however. As the district court recognized, publicly available information and respondents' own allegations demonstrate the allegation is incorrect. "[T]here are all sorts of reasons [for ILECs] not to enter a new territory." Epstein, Related Pub., *supra*, at 16; see also *id.* at 17-18 (detailing reasons). The district court noted that the advantages an ILEC enjoys when

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[12] Indeed, the duty to interconnect in part underlay the allegations in *Trinko*, 540 U.S. 398, which this Court held were insufficient to state a claim of a violation of 15 U.S.C. § 2.

competing with its own infrastructure evaporate when the ILEC competes as a middleman, using another's infrastructure. Pet. App. 52a-53a. Respondents themselves allege a statement by a CEO of one ILEC (JA 22), taken from a quote in which he said that competing as a CLEC was not a sound long-term strategy. Pet. App. 56a. Finally, respondents allege other facts that further explain ILECs' decisions not to enter others' territories as CLECs. According to respondents, entry as a CLEC is extremely difficult because ILECs are taking steps to protect their own territories. JA 23-26. See also *Trinko*, 540 U.S. at 408 (holding allegations of exclusionary conduct by ILECs insufficient to state a claim under § 2).

The complaint contains one allegation of fact apparently directed toward possible direct proof of a conspiracy among petitioners. That allegation is of a public statement by an executive of one petitioner that entering into a competitor's territory "might be a good way to turn a quick dollar but that doesn't make it right." JA 22. Initially, it is not clear the quoted language—even standing alone—gives rise to an inference of a conspiracy rather than unilateral action. Even if it could, Judge Lynch correctly recognized the allegation, which relied on publicly available material, could not be taken at face value when the entire quote was available. Pet. App. 56a. The entire quote made clear that the executive "did not consider becoming a CLEC to be a sound long-term business plan" (Pet. App. 56a)—thus, the executive was expressing unwillingness to pursue a short-term but unsustainable profit at the expense of the long term. The entire statement serves better to explain petitioners' parallel conduct as being in their unilateral best interest—not in any way supporting an inference of a conspiracy.[13]

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[13] Respondents' other allegations of statements by the Illinois Coalition for Competitive Telecom and two U.S. Representatives (JA 44-45) do nothing to exclude the possibility of legitimate unilateral conduct.

Conscious parallel conduct by competing firms does not violate § 1. The pleading standard followed by the panel below nonetheless permits the imposition of severe *de facto* sanctions—perhaps tens of millions of dollars in discovery expenses (a figure that might well approach or exceed the $100 million maximum criminal sanction that would be available against any one defendant for a violation of § 1)—based on a complaint that alleges no facts making it at all probable the parallel conduct is the product of a conspiracy. No understanding of the pleading standards under Rule 8, or the motion to dismiss construct under Rule 12, permits—let alone requires—that result.

## CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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